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cc: "Kenneth L. Money (E-mail)" <kmoney@inco.com>, "John C. Onuska Jr. (E-mail)" <jonuska@inco.com>
Subject: Docket No. EC-2000-007

U.S. Environmental Protection Agency
Enforcement and Compliance Docket
Attn: Docket No. EC-2000-007

Dear Sir or Madam:

On behalf of the International Metals Reclamation Company, Inc. (Inmetco), I am transmitting for electronic filing in Docket No. EC-2000-007 Inmetco's Comments on EPA's proposed rule for the Establishment of Electronic Reporting and Electronic Recordkeeping. 66 Fed. Reg. 46162 (August 31, 2001). The attached Comments are in the form of a Word file. I also am mailing an original and three hard copies of Inmetco's Comments to the Enforcement and Compliance Docket today.

If you have any questions regarding the Comments, please contact Mr. Kenneth L. Money, President of Inmetco, at the mailing address, telephone number, or e-mail address shown on the cover page of the Comments.

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Electronic Reporting Comments.

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Establishment of Electronic Reporting; Electronic Records: Proposed Rule 66 Fed. Reg. 46162 (August 31, 2001)	))))	Docket No. EC-2000-007

COMMENTS OF

THE INTERNATIONAL METALS RECLAMATION COMPANY, INC.

Communications Regarding These
Comments Should Be Directed to:

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November 7, 2001

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Introduction

The International Metals Reclamation Company, Inc. (Inmetco) is pleased to submit these Comments on EPA's proposal to allow electronic reporting and recordkeeping of environmental information under specified conditions, 66 Fed. Reg. 46162 (August 31, 2001). Inmetco is a wholly-owned subsidiary of Inco United States, Inc. whose parent company, Inco Limited, is a Canadian corporation. Inmetco operates a high temperature metals recovery (HTMR) facility in Ellwood City, Pennsylvania. Inmetco's HTMR process—utilizing a combination rotary hearth furnace and electric arc smelting furnace—recovers nickel, chromium, and iron (along with small amounts of other metals) from a variety of metal-bearing secondary materials generated largely by the stainless and specialty steel industries. Some of these materials—*e.g.*, pollution control dust from electric arc furnace operations (K061) and wastewater treatment sludge from metal finishing processes (F006)—are regulated as hazardous wastes under the Resource Conservation and Recovery Act (RCRA). Inmetco also operates cadmium retort furnaces which, in combination with the nickel recovery furnaces, allow Inmetco to recover both nickel and cadmium values from spent nickel-cadmium (Ni-Cd) batteries.[1] As far as we are aware, Inmetco is the only facility in North America capable of thermally recovering nickel, chromium, and cadmium.

The main product of Inmetco's HTMR process is a nickel-chromium-iron remelt alloy that is used as a feedstock to produce stainless steel. Inmetco also produces cadmium metal that can be used to manufacture Ni-Cd batteries. In addition, Inmetco produces a co-product slag and two by-products—air pollution control baghouse dust and wastewater treatment sludge—which are regulated as hazardous wastes as well. The slag, which meets all applicable Land Disposal

[1] Industrial Ni-Cd batteries are regulated as D006 hazardous wastes under RCRA. Consumer Ni-Cd batteries, which are not classified as hazardous waste, are sent to Inmetco for processing under EPA's Universal Waste Rule, 40 CFR Part 273.

Restrictions treatment standards, is used in road building and related applications, while the baghouse dust and wastewater treatment sludge are sent to another HTMR facility for recovery of additional metals, primarily zinc and lead.

Given the nature of its operations, Inmetco is subject to a variety of environmental programs at the federal and state levels. In addition to RCRA, these include the Clean Air Act, the Clean Water Act, and the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA). Regulations promulgated under each of these statutes impose reporting and recordkeeping requirements on Inmetco. For example, 40 CFR § 372.10 requires Inmetco to retain for three years records covering a variety of data and documentation relating to threshold determinations, release and transfer calculations, and other information relevant to the Toxics Release Inventory program administered by EPA under EPCRA. Similarly, 40 CFR § 403.12(o) requires Inmetco to maintain records of all information resulting from its monitoring activities carried out pursuant to EPA's General Pretreatment Regulations for indirect dischargers under the Clean Water Act. State-administered regulations under RCRA and the Clean Air Act also impose recordkeeping requirements,[2] and the permits Inmetco is obligated to obtain under several of these programs contain reporting and recordkeeping requirements of their own.

In short, Inmetco is obliged to comply with a host of recordkeeping and reporting requirements under programs administered directly by EPA or by the Commonwealth of Pennsylvania pursuant to EPA authorization. In many cases, we maintain the data (*e.g.*, the results of sampling and analysis) and other records required under these programs in computerized electronic form, though much of the data and information may be printed out in hard copy format as well.

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[2] *See, e.g.*, 40 CFR § 264.73.

Because Inmetco relies on electronic recordkeeping to some extent today and may wish to expand this reliance in the future, we are greatly concerned about the proposed electronic reporting and recordkeeping rule. As a practical matter, the rule would be mandatory, rather than voluntary, and we believe compliance with its requirements would be very costly and burdensome. The proposed rule seems to be totally enforcement-driven, with little recognition of the practicalities and realities of existing recordkeeping practices and with unrealistic expectations of what can be accomplished and at what cost. Moreover, it appears to rest on the unstated premise that stronger anti-fraud provisions are needed in the case of electronic recordkeeping than in the case of paper records—despite the fact that it is at least as easy to falsify or otherwise compromise the integrity of paper records as it is to do so when the records are maintained electronically.

On balance, although the rule is intended to "reduce the cost and burden of data transfer and maintenance" and to promote electronic record-keeping /reporting as a "practical and attractive option,"[3] we think it is more likely to have the opposite effect—particularly in the case of small and medium sized companies for which the burdens of compliance will make electronic reporting and recordkeeping distinctly unattractive. Accordingly, the proposed rule needs to be rethought and reformulated, particularly as it applies to recordkeeping.

I. The Proposed Rule Effectively Establishes a Mandatory Program Applicable to All Entities Subject to EPA Regulation.

According to EPA, under the proposed rule, "electronic document submission or electronic recordkeeping will be totally voluntary."[4] The new requirements, EPA says,

> "will apply to regulated entities that choose to submit electronic documents and/or keep electronic records, and under today's

[3] 66 Fed. Reg. at 46166.

[4] 66 Fed. Reg. at 46162.

> proposal, the choice of using electronic rather than paper for future reports and records will remain purely voluntary."[5]

That being the case, EPA believes any costs companies may incur to comply with the new requirements will reflect a voluntary judgment that electronic reporting and recordkeeping under the rule is, on balance, a money-saving proposition. Accordingly, EPA has certified the rule "as having no Significant economic impact on a substantial number of small businesses."[6]

The notion that compliance with the rule will be "totally voluntary" is either naive or disingenuous—at least in the case of recordkeeping. If a regulated entity uses computers in any way, shape, or form in connection with recordkeeping—as virtually all regulated entities do today—there is nothing "voluntary" about the rule. Thus, § 3.1(a) explains that the rule "sets forth the conditions under which EPA will accept . . . the maintenance of electronic records, by regulated entities, as satisfying requirements under [EPA regulatory programs] . . . to keep records." And § 3.1(b) states that Subpart C of the rule "applies to records in electronic form that are created, modified, maintained, archived, retrieved, or transmitted by regulated entities under any recordkeeping requirements" of EPA regulatory programs (including those that are administered by a state, tribal, or local agency). Section 3.3 of the rule defines *electronic record* as broadly as possible to mean "any combination of text, graphics, data, audio, pictorial, or other information represented in digital form that is created, modified, maintained, archived, retrieved or distributed by a computer system." And § 3.2(b) proclaims that an electronic record will not satisfy the recordkeeping requirements of an EPA regulatory program unless:

(1) the electronic record "satisfies the requirements" of Subpart C of the rule, and

(2) EPA has published a Federal Register notice announcing that it "is prepared to recognize electronic records" under the specified regulatory program.

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[5] 66 Fed. Reg. at 46163.

[6] 66 Fed. Reg. at 46186.

To make matters worse, the fact that a record has been printed out and stored in hard copy format apparently will not exempt it from coverage under the rule, since the record most likely will have been "created, modified, maintained, archived, retrieved, or transmitted" in electronic form somewhere along the line before or after being printed out on paper.

In these circumstances, compliance with the rule can be termed "voluntary" only in the sense that a company is free to refrain from using computers in its operations. Everyone who does use computers—that is to say, virtually all regulated entities—will have to comply with the rule, at least with respect to some of their records. Indeed, the situation may be even worse than that—because some statements in the preamble to the proposed rule seem to imply that anyone maintaining electronic records today is violating the law:

> "Any regulated company or other entity that maintains records . . . under EPA regulations can store them in an electronic form subject to the proposed criteria for electronic recordkeeping *as soon as EPA announces that the specified records may be kept electronically*."[7]

Is this meant to suggest that anyone who maintain computerized EPA program records today is violating recordkeeping requirements under existing EPA regulations because the Agency has not yet announced that the records may be kept electronically? We certainly hope not. Presumably EPA intends to impose restrictions on electronic recordkeeping prospectively only.[8] If that is correct, the point should be made crystal clear. If it is incorrect, EPA has some explaining to do.

III. The Rule Promises To Be Far More Burdensome and Costly Than EPA Seems To Assume.

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[7] 66 Fed. Reg. at 46167 (emphasis added).

[8] *See* 66 Fed. Reg. at 28268 (suggesting that the restrictions on electronic recordkeeping will apply only "once this rule takes effect").

As noted above, EPA seems to assume the rule will "reduce the cost and burden of data transfer and maintenance" and will establish electronic recordkeeping and reporting as a "practical and attractive option."[9] That assumption must be predicated on the belief that most regulated entities currently are *not* maintaining records electronically—in which case, even very costly and burdensome electronic recordkeeping requirements might allow for a cost savings as compared to the keeping of paper records. Whether electronic recordkeeping conducted in accordance with the requirements of the proposed rule would provide a cost savings *as compared to maintaining paper records* is not, however, the relevant question—because most regulated entities are likely to be employing some form of electronic recordkeeping (as defined in the rule) today. So the relevant questions are:

(1) How much in the way of *additional* costs and burdens would the rule impose on entities that currently maintain their records in a manner that the rule considers to be an *electronic record*; and

(2) Would these new costs and burdens promote expanded use of electronic recordkeeping or, instead, cause firms to cut back on the practice or shelve plans to move in that direction.

We do not know the answer to the first question, and we do not claim to be experts in the field of information technology, so we hesitate to venture an estimate. However, we can say that the nine criteria for acceptable electronic records in § 3.100(a) appear to establish exceedingly burdensome requirements that we expect few, if any, regulated entities are currently meeting in connection with the creation or maintenance of electronic records. Moreover, apart from being burdensome, many of these criteria establish conditions that do not apply to paper records. This is true, for example, of the requirements to ensure that the records cannot be altered; that there is

[9] 66 Fed. Reg. at 46166.

a secure, computer-generated audit trail; and that the records are searchable for reference and secondary use.[10]

In sum, most companies that use computer programs as part of their recordkeeping systems today most likely would have to incur very substantial costs to upgrade the system to meet the requirements of the new rule. We do not believe, for example, that the widely used Microsoft Excel® spreadsheet program has the type of audit trail capability required by the proposed rule. And, as we understand it, EPA does not plan to "grandfather" existing legacy systems; therefore, expensive upgrades or the purchase of new replacement systems would be required. Moreover, since various records have to be retained for periods that are likely to extend beyond the lifetime of the computer hardware or software on which the records were created or initially stored, companies will incur substantial costs either to retain outmoded legacy systems containing the records or to "migrate" them to new systems in accordance with the strictures of § 3.100(a)(9). Of course, companies that do not currently use computers in recordkeeping would incur even greater costs to move to an electronic system that meets the criteria of the rule.

Finally, it is unclear whether a company that begins maintaining records electronically under the rule would be able to discontinue the practice if it finds the costs are too great—or at least it would not be able to discontinue the practice in the case of records that were covered by the rule any time during their existence. Thus, if a record exists in electronic form at some point along the line, the company apparently could not simply print it out on paper and maintain it in that form, rather than electronically, for the balance of the record retention period. Instead, the

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[10] In addition, the certifications EPA is considering as part of the electronic signature registration and surrender process (*see* 66 Fed. Reg. at 46172-46174) may be a prosecutor's dream, but they surely will deter people from utilizing electronic recordkeeping and reporting.

record apparently would become subject to Subpart C of the rule indefinitely.[11] This means it would have to be archived in electronic form and, if necessary, transferred to a new electronic system in accordance with the requirements of § 3.100(a)(9). In short, if a record passes through a computer system somewhere during its creation, maintenance, etc., the company involved would have to incur costs to maintain the record in qualifying electronic form and "migrate" it (along with related metadata) "to a new system, as needed, throughout the required retention period."[12] Once an electronic record, always an electronic record—so a company wishing to experiment with electronic recordkeeping must proceed at its peril.

Conclusion

As indicated above, we believe the requirements for electronic recordkeeping under the proposed rule are unduly stringent and burdensome. According to EPA, they are intended "primarily to ensure that the authenticity and integrity of these documents and records are preserved as they are created, submitted, and/or maintained electronically, so that . . . fraudulent electronic submissions or record-keeping can be prosecuted to the fullest extent of the law."[13] As drafted, the proposed rule certainly meets these enforcement-oriented objectives, but it does so at a very substantial cost and is likely to throw electronic recordkeeping and reporting into disfavor among regulated entities. As far as we are aware, there are no comparable requirements to ensure the authenticity and integrity of paper documents or to provide assurance that they are "trustworthy and reliable."[14] Why does EPA assume the opportunity and incentive for fraud are greater when records are maintained on a computer than when they are reduced to paper?

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[11] *See* proposed 40 CFR § 3.1(b).

[12] 66 Fed. Reg. at 46170.

[13] 66 Fed. Reg. at 46164.

[14] 66 Fed. Reg. at 46169.

In sum, by striving to create a perfect enforcement tool, EPA may have lost sight of the broader objective. If the Agency really wants to "reduce the cost and burden of data transfer and maintenance" and to promote electronic recordkeeping/reporting as a "practical and attractive option,"[15] it should consider ways to streamline and simplify its electronic recordkeeping proposal and refashion it into something that is more practical and realistic, even though it may not give the Agency's enforcement personnel all that they desire.

[15] 66 Fed. Reg. at 46166.